SUPREME COURT, U. S.

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No. 526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

SHELL OIL COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Involved	2
Statutes and Regulation Involved	4
Statement	4
Reasons for Granting the Writ	8
Conclusion	17
Appendix A:	
Pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act Feb. 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717-717w	A-1
Appendix B:	
Federal Power Commission Rules of Practice and Procedure, 18 C. F. R. 1.8, 1.37	B-1
Appendix C:	
Opinion of Fahy, Circuit Judge	C-1
Judgment	C-12
Opinion of Fahy, Circuit Judge, On Petitions for Rehearing	C-13
Order Denying Petitions for Rehearing	C-17
Order	C-18

Table of Cases.

	PAGE
Bowles v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945)	14
F. C. C. v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940)	14
Public Service Comm. of the State of N. Y. v. *F. P. C.*, D. C. Cir., 284 F. 2d 200 (1960)	7, 11
Western Union Tel. Co. v. *U. S.*, 2 Cir., 217 F. 2d 579 (1954)	14

Statutes.

Natural Gas Act,	
§ 7(c), 15 U. S. C. § 717f(c)	2, 4
§ 15(a) 15 U. S. C. § 717n(a)	14, 15, 16
§ 17(b) 15 U. S. C. § 717p(b)	16
§ 19(a) 15 U. S. C. § 717r(a)	3, 9, 10, 11, 13
§ 19(b) 15 U. S. C. § 717r(b)	2, 4, 7, 12, 13
28 U. S. C. § 1254(1)	2

Rules.

Commission's Rules of Practice and Procedure, (18 C. F. R. 1949)	
§ 1.8	4, 17
§ 1.8(a)	5
§ 1.8(a)(1)	7, 15, 16
§ 1.8(a)(2)	7
§ 1.8(b)	7
§ 1.8(f)(2)	5
§ 1.37	4, 16
§ 1.37(f)	8, 14, 16

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in case No. 15,366 on June 15, 1961, rehearing denied August 3, 1961.

Opinions Below.

The opinion of the Court of Appeals is not yet reported. The opinion and the order denying rehearing are reproduced in Appendix C hereto. The orders of the Federal Power Commission (R. 39-40, 69-73, 84-87) are reported at 21 F. P. C. 396, 581 and 22 F. P. C. 95.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 15, 1961. Rehearing was denied on August 3, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §19(b) of the Natural Gas Act, 15 U. S. C. §717r(b).

Questions Involved.

Respondent, by the filing of a notice "that it intervenes in these proceedings" (R. 38), attempted to intervene as a matter of right in a proceeding before the Federal Power Commission. The proceeding involved applications by independent producers of natural gas, including petitioner, for certificates of public convenience and necessity under §7(c) of the Natural Gas Act (15 U. S. C. §717f(c)) to make sales in interstate commerce of natural gas for resale. The gas, to be produced and initially delivered in Texas, was to be transported to and ultimately consumed in the Chicago area. None of the gas was destined, directly or indirectly, to the State of New York, to which State respondent's regulatory function is restricted. The Federal Power Commission denied this attempted "of right" intervention, but granted limited participation to enable respondent to show the interest on which it based its claim to intervene (R. 41). Respondent did not apply for rehearing on the order denying the attempted "of right" intervention within 30 days after the issuance thereof. However within such 30 day period, respondent filed an application for subpoenas in which it stated that it did not concede the propriety of the order "denying our intervention herein" and that it did not recede from its position that it was an intervenor (R. 42, 47).

The Commission denied the motion for subpoenas (R. 69-73), stating that it did not deem respondent's intervention to be "reasonable, appropriate, or necessary in the public interest as a remedy to accomplish the objectives which it states" (R. 72). Within 30 days after the issuance of this latter order, but more than 30 days after the order denying attempted "of right" intervention, respondent applied for reconsideration of both of such orders (R. 74-83). Reconsideration was denied (R. 84), and respondent's petition in the court below followed.

The Court of Appeals, on the premise that the Commission's rules governed, held that in the case of a State Commission, intervenor status is acquired merely by filing a notice of intervention (App. C, pp. 5, 6, 7). The court did not, therefore, reach the other issue (strenuously urged below by respondent) as to whether respondent had established a sufficient interest that it should have been granted permissive intervention. This latter question, not having been reached by the court below, is not involved here. The instant questions involve solely the conclusion of the Court of Appeals in reversing the Commission on the issue of "of right" intervention by a State Commission in a proceeding before the Power Commission where the gas involved is not destined, directly or indirectly, to the State in which the would-be intervenor has regulatory jurisdiction.

The questions presented are:

1. Whether the Court of Appeals had jurisdiction to entertain the "of right" intervention issue where respondent did not comply with §19(a) of the Natural Gas Act [15 U. S. C. §717r(a)] in that it failed to apply for rehearing within 30 days after issuance of the order denying "of right" intervention?

2. Whether, assuming an affirmative answer to the foregoing question, the Court of Appeals exceeded the appropriate scope of its review power in rejecting the Federal Power Commission's construction of its own rules, and substituting its judgment for that of the Commission?

Statutes and Regulations Involved.

This case involves §§15(a), 19(a) and 19(b) of the Natural Gas Act [15 U. S. C. §§717n(a), 717r(a) and (b)] and §§1.8 and 1.37 of the Commission's Rules of Practice and Procedure [18 C. F. R. §§1.8 and 1.37 (1949)]. The pertinent sections of the Natural Gas Act are reproduced in Appendix A hereto. The pertinent sections of the Commission's rules are reproduced in Appendix B hereto.

Statement.

Petitioner filed an application with the Commission under §7(c) of the Natural Gas Act [56 Stat. 83, 15 U. S. C. §717f(c)] seeking a certificate of public convenience and necessity to sell to a pipeline company natural gas to be produced in Texas. The gas is to supply the pipeline's customers in the Chicago area and elsewhere in the midwest. None of the gas is destined to the State of New York. By order dated February 20, 1959, the Commission consolidated petitioner's application with that of several other applications for certificates (R. 33-37).

Although none of the gas was destined to New York, respondent filed with the Commission on March 16, 1959 a "Notice of Intervention", the body of which reads in full (R. 38):

> "The Public Service Commission of the State of New York, a regulatory body of the State of New

> York having jurisdiction to regulate rates and charges for the sale of natural gas within said State, hereby gives notice that it intervenes in these proceedings."

On March 26, 1959, the Commission issued an order entitled "Order Permitting Limited Participation and Denying Intervention Pending Further Order" (R. 39-41).* In this order the Commission observed that the notice of intervention was "pursuant to Section 1.8(a) of the Commission's Rules of Practice and Procedure" (R. 39), and that (R. 40):

> "An examination of the aforesaid applications and petitions reveals that (1) no part of the natural gas proposed to be sold, transported and delivered will be transported, sold, delivered, resold or consumed within the State of New York; and (2) that none of the applicants own or operate, or propose to own or operate, any natural gas facilities within said State."

It appears clear that the foregoing order of March 26th denied respondent's claimed "of right" intervention. However, the order provides that "* * * in view of the possibility that [respondent] might have a real and valid but as yet undisclosed interest in the proceedings which it could support if given the further opportunity to so do", and permitted respondent to participate in the proceeding for the limited purpose of establishing, if it could, that it had such an interest as to warrant its participation as an intervenor (R. 41).

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* Section 1.8(f)(2) of the Commission's rules provides for action on petitions to intervene and states that "* * * the Commission will grant or deny such petition in whole or in part or may, if found to be appropriate, authorize limited participation." 18 C. F. R. §1.8(f)(2).

Respondent did not apply for rehearing on the March 26th order until May 27, or more than 60 days after its attempted "of right" intervention was denied.

For the purpose of a clearer understanding of the procedural steps, the following chronology of the more important events (all within 1959) is given:

February 20—FPC notice of applications, consolidation and date of hearing (R. 33).

March 16—Respondent filed notice of intervention (R. 38).

March 26—FPC order denying intervention "of right" but permitting limited participation to respondent (R. 39).

March 31—Hearing began on merits of certificate applications (respondent appeared at this hearing but tendered no witnesses nor documentary evidence to establish an interest) (R. 1, 14).

April 3—Hearing concluded on certificate applications (R. 95).

April 3—Respondent filed application for subpoenas for attendance of witnesses and production of documents (R. 42).

April 27—FPC denied respondent's application for subpoenas (R. 69).

May 27—Respondent applied for reconsideration of FPC's orders of March 26 and April 27 (R. 74).

July 16—FPC denied respondent's application for reconsideration (R. 84).

In respondent's petition for review in the court below it prayed that the orders of March 26, April 27 and July

16, 1959 be set aside (Pet. for Review, p. 12).* The court granted this relief and remanded the case for further proceedings. This means that the certificate proceeding which was concluded on its merits by the Commission's order of December 1, 1959 (Docket Nos. G-14829 *et al.*, 22 F. P. C. 979) which adopted the Presiding Examiner's decision of August 25, 1959 (Docket Nos. G-14829 *et al.*, 22 F. P. C. 982) issuing an unconditioned certificate to petitioner, must be reopened to permit full participation by respondent to present whatever evidence and argument it might choose to present.

In the court below the New York Commission argued first that as a State regulatory commission it was entitled to intervene as of right under §1.8(a)(1) of the Commission's Rules of Practice and Procedure (18 C. F. R. §1.8(a)(1)) by the mere filing of a notice of intervention; and that in any event it was entitled to permissive intervention under §1.8(a)(2) and §1.8(b) of the foregoing rules in that it had an interest which would be directly affected and that it would be bound by the Commission's action.

The Court of Appeals did not reach the second point argued by the New York Commission. Observing that the

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* The Commission filed a motion to dismiss this petition on the ground that the orders were not reviewable and that a would-be intervenor has no standing to petition for review as he is not a party to the proceeding. In a prior opinion involving this and two other cases, the court below held that a would-be intervenor is a party to the proceeding and is "aggrieved" within the meaning of §19(b) of the Natural Gas Act [15 U. S. C. §717r(b)] when his application to intervene is denied. *Public Service Comm. of the State of N. Y. v. F. P. C.*, D. C. Cir., 284 F. 2d 200 (1960). In that case the court below held that a would-be intervenor must comply with §19(b)'s sixty day jurisdictional limitation upon the time within which review must be sought, and a would-be intervenor whose application for intervention has been denied cannot await the final order upon the merits of the controversy and seek judicial review within 60 days thereof, as he is not a party to the proceeding in the full sense of the term and is not "aggrieved" by such final order.

consolidated cases before it "naturally are governed by the Commission rules", *infra*, App. C, pp. 4, 5, the Court of Appeals reversed the Commission's interpretation and application of its own Rules of Practice and Procedure. The court held that as to a State commission, intervenor status is acquired by the mere filing of a notice. *Infra*, App. C, pp. 5, 6, 7. The court appears to reason that the requirement that a State commission must be "*interested*", as that term is employed in §1.37(f) of the Commission's rules [18 C. F. R. §1.37(f)], refers only to a State commission "interested in utilizing the cooperative procedures of the Act", *infra*, App. C, p. 6, and concludes that "[t]he essence of the matter is that under the present rules the interest of a State Commission in intervening is shown when it files a notice of intervention * * *", *infra*, App. C, p. 7. One judge, although he concurred in the result, differed with the majority on the "of right" intervention question.

Reasons for Granting the Writ.

The questions presented are of general importance in the interpretation and administration of the Natural Gas Act and the Commission's rules issued thereunder, and on the appropriate scope of judicial review of an agency's order interpreting and applying its own rules.

1. Although we strenuously urged the point in brief and oral argument, the Court of Appeals did not come to grips with the question of whether it had jurisdiction to entertain the question of "of right" intervention because respondent did not apply for rehearing within 30 days on the order which denied its attempt to intervene as a matter of right. Since the decision below rests solely on its conclusion that respondent acquired intervenor status by the

mere filing of a notice, the decision cannot stand if the court was without jurisdiction to entertain that question.

The court's opinion is silent on this jurisdictional issue.* We can only surmise that the court felt that once it concluded that respondent was entitled to "of right" intervention, its status as such was acquired upon filing the notice, and that ended the matter. If we have correctly surmised the court's reasoning, then we submit an erroneous conclusion was drawn by the court, because concluding that respondent was entitled to "of right" intervention did not resolve, but merely created, the question of whether respondent was required to comply with §19(a)'s requirement and apply for rehearing within 30 days after it was denied "of right" intervention.

On March 16, 1959, respondent, assuming it was entitled to intervene as a matter of right, filed a notice of intervention in which it informed the Commission that it "hereby gives notice that it intervenes in these proceedings" (R. 38). The Commission refused to accept the notice as an "of right" intervention, but instead treated the notice as a petition to intervene and issued its order of March 26, 1959 in which respondent was afforded the opportunity to prove, if it could, that it had such an interest which would serve as a basis for permissive intervention (R. 39). Respondent did not apply for rehearing on this March 26 order until May 27, 1959, more than two months after it was issued.

On April 3, 1959 (within 30 days of the order denying intervention), respondent did file with the Commission a document styled "Application for Subpoenas for the

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* The court in note 4, *infra*, App. C, p. 3, said: "In its application for subpoenas and for reconsideration Public Service Commission [respondent] consistently maintained that it acquired intervenor status by the filing of the notice of intervention." This, we submit, was not an application for rehearing.

Attendance of Witnesses and for the Production of Documents Pursuant to Rule 1.23" (R. 42-49). This document was not an application for rehearing. Aside from the fact that it does not conform to the requirements of §19(a) of the Natural Gas Act for an application for rehearing (App. A, p. 1), the prayer of the document makes this clear.* Moreover, by seeking subpoenas, respondent was merely attempting to establish that it had an interest which would warrant permissive intervention.

By not "conced[ing] the propriety of the order of March 26, 1959, *denying our intervention herein*" and by not receding from its position that "it is an intervenor in this proceeding as of right", respondent did not supply, it merely emphasized the need for, the application for rehearing. Yet it was not until May 27, 1959 (two months after the order "denying our intervention herein") that respondent filed an "Application for Reconsideration of Orders of *March 26* and April 27, 1959" (R. 74-83), a clear recognition by respondent that an application for rehearing was required on the order denying "of right" intervention, but an equally clear indication that it came about 30 days too late.

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* The prayer of the application for subpoenas reads (R. 47-48):

"For the foregoing reasons, we request that this application be granted and that the subpoenas, hereinabove requested, be issued.

"In making this request, however, the New York Commission does not concede the propriety of the order of March 26, 1959, *denying our intervention herein*, nor does it recede from its position -

"1. That, per the Commission's extant rule, it is an intervenor in this proceeding as of right;

"2. That its allegations of interest are sufficient to support its intervention without any additional showing; and

"3. That if any additional showing in support of its allegations is necessary, such showing may be made by reference to documents and records contained in the Commission's files." (Emphasis supplied here and throughout.)

In its belated application for rehearing respondent prayed (R. 78):

> "We therefore request reversal of *the Commission's order of March 26 denying our intervention* and further request the issuance of an order acknowledging the status of the New York Commission as a party-intervenor herein."

Section 19(a) of the Natural Gas Act affords to one aggrieved by an order of the Commission the right to "apply for a rehearing within thirty days after the issuance of such order" [15 U. S. C. 717r(a)]. The same section of the Act makes it clear that such an application is a jurisdictional prerequisite to review. It provides [*id.*]:

> "No proceeding to review *any* order of the Commission shall be brought by *any* person unless such person shall have made application to the Commission for a rehearing thereon."

It is submitted that §19(a)'s requirement that an application for rehearing be filed within 30 days after issuance of the order is jurisdictional to the right of review, and that this jurisdictional prerequisite is applicable to an order rejecting an attempted "of right" intervention. Such an order aggrieves the would be intervenor and entitles him to seek judicial review provided he timely complies with §19's requirements.

Public Service Commission of N. Y. v. F. P. C., 284 F. 2d 200, *supra*, demonstrates the confused situation in which the decision below leaves the question of intervention in proceedings before the Federal Power Commission. In that proceeding, as here, respondent attempted to intervene as of right by filing a notice. There, as here, the Commission denied "of right" intervention but permitted "limited

participation" in a certificate proceeding. There, the Power Commission, by order dated March 26, 1959, denied application for rehearing and denied intervention. The New York Commission did not seek review of this order denying rehearing. However, after the Power Commission entered its order on the merits in the certificate proceeding, the New York Commission renewed its application for intervention and also sought rehearing on the Power Commission's order on the merits. These were rejected, and within 60 days of the rejection order, the New York Commission petitioned for review in the court below. The court dismissed the petition on the ground that the order denying intervention was a reviewable order and since the New York Commission did not seek review thereof within 60 days as required by (19(b) of the Act, it lost its rights and could not thereafter seek review either of the order denying intervention or of the final order on the merits.

Bearing in mind that the would be intervenor in the case at 284 F. 2d 200 is the same State commission which sought "of right" intervention in the instant case, and that in each case the same vehicle to get into a pending proceeding—notice of intervention—was employed, the court below, in the prior case, said (284 F. 2d at p. 204):

> "• • • We summarize: A would-be intervenor is a party to a proceeding in a limited sense, restricted to the proceedings upon the application for intervention; he is aggrieved by the denial of his application; he is not a party to the proceeding in the full sense of the term and is not aggrieved by the final order upon the merits of the controversy."

And earlier in the decision the court stated (*id.*):

> "It follows from the two foregoing conclusions that the New York Commission had a right to petition

> for review of the order of March 26th, which was the order which finally denied its application for intervention and denied reconsideration thereof. Since it had a right to file a petition at that point, the statute limited to sixty days the period within which it must exercise that right. Its failure to file such a petition was not rectified by the later renewal of the application to intervene and the petition to review the rejection of that application." [Footnote omitted.]

In the instant case the court below holds that a State commission becomes a party to the proceeding by the mere filing of a notice of intervention. Conceding, for the sake of argument, that that is true, does that mean that if the Power Commission nonetheless denies the attempted "of right" intervention, the would-be intervenor need not timely seek rehearing and judicial review of such an order? Only by an affirmative answer can we find any basis for the court below assuming, *sub silentio*, that respondent was not required to comply with (19(a)'s 30 day jurisdictional limitation upon the right to seek rehearing. But if the question is to be answered in the affirmative, how can the decision below square with the one by the same court at 284 F. 2d 200? There this same State commission was held barred from judicial review because it did not seek such review within the statutory period. But (19(b)'s 60 day limitation does not begin to run until "after the order of the Commission upon the application for rehearing", 15 U. S. C. 717r(b). Hence, if the would-be intervenor is not required to apply for rehearing on the order denying intervention, he would seem also to be relieved of (19(b)'s time limitation, a result directly contrary to the conclusion of the court below in its opinion at 284 F. 2d 200.

The foregoing demonstrates the need for this Court to review and to set at rest the issue raised in question 1.

2. The Court of Appeals exceeded the appropriate scope of judicial review of the Commission's order interpreting and applying its own Rules of Practice and Procedure. The court scrutinized the Commission's determination not with the view to ascertaining whether it was reasonable, but rather whether the court would have similarly construed the rules had it been sitting initially as the administrative agency.* Such an approach to the review function, particularly when a federal agency construes and applies its own procedural rules, transcends the appropriate scope of judicial review. *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Boules* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945); *Western Union Tel. Co.* v. *U. S.*, 2 Cir., 217 F. 2d 579 (1954).

In his opinion on the question of "of right" intervention (*infra*, App. C, p. 8), Judge Danaher amply demonstrates that the Commission's determination was not alone reasonable, it was correct. Moreover, the plain words of the Commission's rules, especially when read in the light of §15(a) of the Natural Gas Act [15 U. S. C. §717n(a)], make clear that the Commission's construction was right.

Section 1.37(f) of the Commission's Rules of Practice and Procedure [18 C. F. R. §1.37(f)] provides:

> "*Intervention by State commissions.* Any *interested* State commission may, as a matter of right,

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* In its opinion on rehearing the court below said (App. C, p. 15):

> "It [the Power Commission] decided that under its rules, promulgated under express statutory provision for the governance of procedure, the New York State Commission did not acquire intervenor status by filing notice of intervention. In this, for the reasons explained in our main decision, we think the Power Commission was *mistaken*."

> intervene in *any* proceeding before the Federal Power Commission, as provided in §1.8."

The Court of Appeals construed §1.37(f) as applying only to a State commission interested in utilizing the cooperative procedures of the Act. Thus the court, while reading §1.8(a)(1) "as meaning what it says" (App. C, p. 5), refused to accord like treatment to the clear language of §1.37(f).

Section 15(a) of the Natural Gas Act [15 U. S. C. §717n(a)] provides in part:

> ". . . In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any *interested State*, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

The Act itself does not confer *of right* intervention upon anyone. It merely confers upon the Commission the power to prescribe rules pursuant to which "interested" State commissions may become a party. With that statutory basis as its authority, the Commission adopted §1.8 of its rules setting out the procedure pursuant to which those would-be intervenors *designated in and possessing the requisites of the Act* would be admitted as a party. It would have been redundant for the Commission in adopting §1.8(a)(1) to add "interested" to States and State commissions, because the Act itself imposed that limitation. Indeed, it could be said that under §15(a), the Commission has no power to admit an *un*interested State commission unless it could be found that in some way such a commission's participation may be in the public interest.

Assuming, but not conceding, that the court below was correct in concluding that §1.37(f) is limited to State commissions interested in utilizing the cooperative procedures of the Act, that does not mean that §1.8(a)(1) can be interpreted without regard to the provisions of §15(a) of the Act so as to authorize any State Commission, whether or not properly interested in a proceeding before the Power Commission, to intervene merely upon filing a notice. Just the contrary appears to be the case when the Commission's rules (§§1.8 and 1.37) are read in the light of the provisions of §§15(a) and 17(b) of the Act [15 U. S. C. §§717n(a) and 717p(b)].

Section 15(a) deals with "*any proceeding before it*" [i.e., the Federal Power Commission] and permits the Commission to admit "any *interested* State, State commission, municipality . . . [as] a party to *such* proceeding. . . ." Section 17 of the Act deals with cooperation between the Power Commission and State commissions. Section 17(b) of the Act authorizes the Power Commission "to hold *joint* hearings with any State commission" in certain instances [15 U. S. C. §717p(b)]. But neither §17 nor any other section of the Act prescribes standards for intervention in *joint* hearings with State commissions. Hence it was necessary when the Commission promulgated its rules dealing with joint hearings, which it did in adopting §1.37, to specify that State commissions seeking to intervene therein could do so by notice, provided they were "interested" State commissions. However, there was no need to specify such limitation in §1.8 which deals with proceedings held before the Power Commission sitting alone, as §15(a) of the Act makes clear that only "interested" State commissions may be admitted as a matter of right as a party to such proceedings.

We submit that the court below went out of its way, and at any rate far beyond the appropriate scope of its review power, in straining §1.8 to mean that *any* State commission having power to regulate gas rates within the State (and the same reasoning would have to apply to the untold number of regulatory bodies of *municipalities*), and irrespective of its interest in a pending proceeding, had the right to become a party by the mere filing of a notice to that effect.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix A.

Pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act Feb. 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717-717w.

SEC. 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest. [15 U. S. C. 717n(a)]

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SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. • • • [15 U. S. C. 717r(a)]

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Appendix A.

SEC. 19(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do * * * [15 U. S. C. 717r(b)]

Appendix B.

Federal Power Commission Rules of Practice and Procedure, 18 C. F. R. §§1.8, 1.37.

§1.8 *Intervention*

(a) *Initiation of intervention.* Participation in a proceeding as an intervener may be initiated as follows:

(1) By the filing of a notice of intervention by a State Commission, including any regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy, or natural gas, as the case may be, to consumers within the intervening State or municipality.

(2) By order of the Commission upon petition to intervene.

(b) *Who may petition.* A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be:

(1) A right conferred by statute of the United States;

(2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Commission's action in the proceeding (the following may have such an interest: consumers served by the applicant, defendant, or respondent; holders of securities of the applicant, defendant, or respondent; and competitors of the applicant, defendant, or respondent).

(3) Any other interest of such nature that petitioner's participation may be in the public interest.

• • • • • •

Appendix B.

§1.37 *Cooperative procedure with State commissions.*

• • • • • •

(f) ***Intervention by State commissions.*** Any interested State commission may, as a matter of right, intervene in any proceeding before the Federal Power Commission, as provided in §1.8.

Appendix C.

Opinion of Fahy, Circuit Judge.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15366.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SHELL OIL COMPANY, SOUTH TEXAS NATURAL GAS GATHERING COMPANY,
Intervenors.

No. 15854
and
No. 15910.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

Decided June 15, 1961

Before EDGERTON, FAHY and DANAHER,
Circuit Judges.

FAHY, Circuit Judge: These petitions for review of orders of the Federal Power Commission, herein usually

referred to as the Commission, involve the effort of the Public Service Commission of the State of New York, herein referred to as PSC, to intervene in three separate proceedings before the Commission.[1] The petitions are filed pursuant to section 19(b) of the Natural Gas Act.[2]

The Commission proceedings were on applications filed by independent producers of natural gas for certificates of public convenience and necessity to sell natural gas for transportation and resale in interstate commerce under section 7(c) and (e) of the Natural Gas Act.[3] None of the gas was to come into New York State, but in denying intervention the Commission assumed the truth of PSC's allegations that the fields from which the gas originates, namely, Texas Railroad Districts 2, 3 and 4 and the southern Louisiana fields, are important sources of supply for

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[1] In our No. 15366, entitled before the Commission, *Texas Illinois Natural Gas Pipeline Co., et al.*, five independent producers of natural gas (Shell, Hargrave, Sunray, Union, and Bettis & Shepard) and one gas gathering company (South Texas) sought FPC certificates of public convenience and necessity authorizing sales of natural gas for resale in interstate commerce. The natural gas involved was to be produced, sold and delivered to the ultimate purchaser, Texas Illinois, within Railroad District 4 in Texas, and then transported in Texas, Arkansas, Missouri and Illinois for ultimate consumption in the Chicago area.

In our No. 15854, entitled before the Commission, *Peoples Gulf Coast Natural Gas Pipeline Co., et al.*, Peoples requested additional authority for the construction of pipeline facilities and seven independent producers requested FPC certificates of public convenience and necessity authorizing sales of natural gas to Peoples, an interstate pipeline company serving markets in the State of Illinois. The gas involved in this proceeding was to be gathered in Texas Railroad Districts 2, 3 and 4.

Our No. 15910, entitled before the Commission, *Coastal Transmission Corp., et al.*, involved proposed] oducer sales of natural gas from Texas Railroad Districts 2, 3 and 4 and also proposed sales from fields in southern Louisiana. The natural gas under consideration was destined for ultimate resale and consumption in Florida.

[2] 52 Stat. 831 (1938), 15 U. S. C. §717r(b) (1958).

[3] 56 Stat. 83, 84 (1942), 15 U. S. C. §717f(c), (e) (1958).

the three pipelines serving New York. It is the position of PSC that the price of the New York gas would be affected by the price authorized to be charged in the certificates applied for.

In each proceeding PSC filed a notice of intervention, the principal part of which reads as follows:

Notice of Intervention

> The Public Service Commission of the State of New York, a regulatory body of the State of New York having jurisdiction to regulate rates and charges for the sale of natural gas within said State, hereby gives notice that it intervenes in these proceedings.

The denial of intervention in each case was followed by petition to the Commission for reconsideration, and after its denial timely petition to this court for review.[4]

The position of the Commission is that PSC was entitled to intervene only upon showing an interest over and above

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[4] In No. 15366 the notice of intervention was filed March 16, 1959. On March 26, 1959, the Commission issued an order denying intervention pending further order but granting limited participation to permit PSC to show the interest on which it based its claim to intervene. PSC's application to the Commission for subpoenas to enable it to show that interest, as it claimed, was denied April 27, 1959. PSC timely applied for reconsideration, which was denied July 16, 1959, followed by petition for review filed with this court September 14, 1959. In its application for subpoenas and for reconsideration PSC consistently maintained that it acquired intervenor status by the filing of the notice of intervention. In No. 15854 the PSC filed notice of intervention on February 10, 1960. The Power Commission on March 21, 1960, issued an order denying intervention, followed April 20, 1960, by PSC's application for rehearing and reconsideration. This was denied May 5, 1960, and PSC's petition for review was filed with this court July 1, 1960. In No. 15910 PSC filed its notice of intervention December 31, 1959. The Commission on March 31, 1960, issued an order denying participation by PSC as an intervenor. PSC applied on May 2, 1960, for rehearing and reconsideration, which was denied May 31, 1960, followed by petition to this court for review filed July 29, 1960.

that evidenced by the filing of a notice of intervention, and that it failed to make such a showing. The Commission relies primarily upon the decision of this court in *Memphis Light, Gas & Water Div.* v. *Federal Power Comm'n*, 100 U. S. App. D. C. 205, 243 F. 2d 628. That case, however, arose on petition of a private company to intervene. Upon consideration of the provisions of the Act and the rules governing intervention by private interests this court held the Commission had not erred in denying intervention. It was not necessary to consider the rules governing intervention of state regulatory commissions. The reason for the Commission's reliance in the present case upon *Memphis* is unclear to us.

The statutory provisions governing intervention are in section 15(a) and (b) of the Natural Gas Act:

> (a) . . . In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.
>
> (b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission . . .[5]

The Act is thus phrased in permissive terms. The permission, however, is to be controlled by such "rules and regulations as it [the Commission] may prescribe." All hearings, investigations and proceedings are to be governed by "rules of practice and procedure to be adopted by the Commission." The cases before us naturally are governed

[5] 52 Stat. 829 (1938), 15 U. S. C. §717n(a), (b) (1958).

by the Commission rules. They were first published in the Federal Register in 1947 and provide as follows:

> §1.8 *Intervention*
>
> (a) *Initiation of intervention.* Participation in a proceeding as an intervener may be initiated as follows:
>
> (1) By the filing of a notice of intervention by a State Commission, including any regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy, or natural gas, as the case may be, to consumers within the intervening State or municipality.[6]

We read this language as meaning what it says; it grants permission to a State Commission to participate as intervener by filing a notice of intervention. No application to be acted on by the Commission is required. A State Commission initiates its own participation as intervener in behalf of consumers within the "intervening State." This appears not only from the language of section 1.8(a)(1) but by contrasting with it the provisions immediately following in section 1.8(a)(2), governing intervention of parties other than State Commissions. Such parties may intervene only on "order of the Commission upon petition to intervene." The order is to be sought on petition filed "by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought." Provision is made for answer to the petition, and the Commission in due course will grant or deny the petition, in whole or in part, or may authorize limited participation. Under these detailed provisions the petitions are required to be acted upon one way or another by the Commission. This is in sharp contrast with the rules applicable to a State Commission. There is no requirement of a peti-

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[6] 18 C. F. R. §1.8 (1949).

tion to intervene, or answer thereto or action thereon by the Federal Commission granting a petition in whole or in part or allowing limited participation. Intervener status is acquired by the filing of a notice of intervention. And insofar as we are advised the Commission never, prior to our *Memphis* decision, sought to apply its rules to require a State Commission, in order to intervene, to do more than file a notice of intervention. This approach to the matter no doubt emanated from the Commission's faith that public service commissions, public bodies with public responsibilities, would not abuse the right granted.

The difference between public and private parties in the method of obtaining intervener status is emphasized by the "Definition" of "Interveners" contained in the Commission's rules, which reads:

> Persons petitioning to intervene as provided by § 1.8, when admitted as a participant to a proceeding, and State Commissions giving notice of intervention as provided in said section, are styled interveners.[7]

This provision again makes clear that in the case of a State Commission intervener status is acquired by filing a notice of intervention, whereas others become interveners on petition "when admitted as a participant to a proceeding."

The section of the rules adopted to carry out the policy of the Act authorizing cooperation between the Federal Commission and State Commissions is also pertinent.[8] These rules, in detailed fashion, exemplify the Commis-

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[7] 18 C. F. R. §1.1(f)(13) (1949). The "Definition" continues: "Admission as an intervener shall not be construed as recognition by the Commission that such intervener might be aggrieved by any order of the Commission in such proceeding." This has no bearing on who is an intervener before the Commission, or on how intervention is acquired. It has to do with court review of Commission orders.

[8] 18 C. F. R. §1.37 (1949).

sion's desire to make effective the solicitude of Congress for cooperation between State Commissions and the Federal agency. These rules are under the heading of cooperation, not of intervention, but the very last subdivision provides:

> (f) *Intervention by State commissions.* Any interested State commission may, as a matter of right, intervene in *any* proceeding before the Federal Power Commission, as provided in § 1.8.[9]

The "interested State commission" thus referred to is a State Commission interested in utilizing the cooperative procedures of the Act. Such a State Commission may intervene as of right, as provided in section 1.8, that is, by filing a notice of intervention. No petition for intervention or action thereon is required.

We are cited to no instance of abuse of the right. Indeed, the present position of the Commission, as we have suggested, seems to have been due to a misinterpretation of the *Memphis* decision, which dealt with the effort of a private party to intervene under the provisions of section 1.8(a)(2).

The essence of the matter is that under the present rules the interest of a State Commission in intervening is shown when it files a notice of intervention, whereas the interest of a non-public entity must be established on petition to the Commission for permission to intervene under the procedures of section 1.8(a)(2) and 1.8(b), eventuating in an order of the Commission. Whether or not experience has shown that the right granted to a State Commission should be subject to controls similar to those applicable to others is not for us to decide, for the present cases are governed by the present rules. *Bell* v. *United States*, —— U. S. ——; *Service* v. *Dulles*, 354 U. S. 363; *Vitarelli* v. *Seaton*, 359 U. S. 535; *Chapman* v. *Sheridan-Wyoming Co.*, 338 U. S.

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[9] 18 C. F. R. §1.37(f) (1949).

621, 629; *McKay* v. *Wahlenmaier*, 96 U. S. App. D. C. 313, 321, 226 F. 2d 35, 43.

The orders under review will be set aside and the cases remanded for such further proceedings as are not inconsistent with this opinion.[10]

It is so ordered.

Concurring Opinion of Danaher Circuit Judge.

DANAHER, *Circuit Judge:* I concur in the result reached by my colleagues but for a different reason.

Public Service Commission of the State of New York insists, and my colleagues seem to agree, that the N. Y. Commission was here entitled to intervene as of right simply by giving notice "that it intervenes in these proceedings." I think even a State or State Commission must make some showing that it is "interested," but that the N. Y. Commission on the record here sufficiently alleged the requisite basis for its interest.

Section 15 of the Act[1] provides: "In any proceeding before it, the [Federal Power] Commission *in accordance with such rules* and *regulations* as it may prescribe, *may* admit as a party *any interested State, State Commission* . . . ." or others named. (Emphasis added.)

That language, as I read it, plainly grants to the Commission a discretion, the exercise of which turns upon

[10] No. 15366 was before this court in *Public Service Comm'n* v. *Federal Power Comm'n*, ... U. S. App. D. C. ....., 284 F. 2d 200, where it was held that PSC's right of review was limited to review of the order denying intervention notwithstanding the Commission proceedings had eventuated in a final decision on the merits. Compare *Virginia Petroleum Job. Ass'n* v. *Federal Power Comm'n*, 104 U. S. App. D. C. 106, 259 F. 2d 921. We consider this earlier decision as the law of the case insofar at least as No. 15366 is concerned. Moreover, none of the parties to No. 15366 or to Nos. 15854 or 15910, all consolidated, now press any question as to the correctness of the previous decision in No. 15366.

[1] 15 U. S. C. §717n (1958).

whether or not any State or State Commission demonstrates itself to be "interested" in the pending proceeding. The Commission's regulations should be read in that context, it seem to me.

Thus we turn to the Commission's Rule 1.8[2] which first outlines how participation in a "proceeding"[3] may be "initiated" by a prospective "intervener."[4] The N. Y. Commission properly "initiated" its proposed participation by the filing of the required notice of intervention. The Commission, agreeably to the statute, at that point may require a showing as to whether or not *continued* participation as a party is to be permitted, and to what extent. If a State Commission shows itself genuinely to be "interested," it is to be accorded the status of an intervener. It may be permitted to participate on a limited basis, to the extent it shows itself to be "interested." I think the rules and the statute must be read together, and if a State Commission can make no showing that it is "interested," continued participation in the proceeding may be terminated.

My colleagues seem to say that the N. Y. Commission, simply because it is a State regulatory body, has a "right" to intervene in a proceeding involving producers' rates, say in Oklahoma, as to gas to be delivered in Detroit. By parity of reasoning, the Commission would be bound to admit any and all regulatory bodies to whom reference is made in Rule 1.8(a)(1). Surely each such body should be required to demonstrate an interest. I find myself unable to accept the proposition that the already overburdened Commission is bound to accept as a party every State and municipal regulatory body which has jurisdiction to regulate rates to consumers "within the intervening State or municipality."

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[2] 18 C. F. R. §1.8 (1958), as quoted in Judge Fahy's opinion.

[3] As defined in 18 C. F. R. §1.1(f)(18) (1958).

[4] As defined in 18 C. F. R. §1.1(f)(13) (1949).

Here, and on this record, I am satisfied that the N. Y. Commission actually demonstrated a valid interest, one of which the Commission was made well aware. For example, in Case No. 15,910, the Commission's order denying the N. Y. Commission's application for rehearing and reconsideration of the order denying intervention recited:

> "PSC [N. Y. Commission] does inform us that its interests arise out of the fact that it is served by pipeline companies which purchase supplies of natural gas in the same Texas and Louisiana production areas involved herein, and by its application, PSC specifically contends that:
>
> > '• • • unconditional certification of these sales at the proposed initial prices will adversely affect ultimate consumers in the New York market area (1) by further entrenching "out of line" prices as the producing area bargaining floor for future gas purchase negotiations by New York-serving pipelines; and (2) by furnishing additional high price points of reference to be used in redetermining prices under clauses for that purpose contained in numerous gas purchase contracts of New York-serving pipelines.' "

I believe the foregoing succinctly outlines the nature of the situation which made the N. Y. Commission "interested," particularly in light of the spirit of "Catco," *Atlantic Rfg. Co.* v. *Pub. Serv. Comm'n*, 360 U. S. 378, 391 (1959).

Under the circumstances, I concur in the result, for I think the Commission here erred when it denied intervention since the N. Y. Commission's representations were sufficient to demonstrate a proper basis for further participation.

Appendix C.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15,366 September Term, 1960.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SHELL OIL COMPANY and SOUTH TEXAS NATURAL GAS GATHERING COMPANY,
Intervenors.

No. 15,854

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 15,910

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

Before: EDGERTON, FAHY and DANAHER, Circuit Judges.

Appendix C.

Judgment.

(Filed Jun 15 1961.)

These cases came on to be heard on the records from the Federal Power Commission, and were argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this court that the orders of the Federal Power Commission on review in these cases are set aside, and that these cases are remanded to the Federal Power Commission for such further proceedings as are not inconsistent with the opinion of this court.

Per Circuit Judge Fahy.

Dated: June 15, 1961.

Separate opinion by Circuit Judge Danaher concurring in the result but for a different reason.

Appendix C.

Opinion of Fahy, Circuit Judge, On Petitions for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15366

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SHELL OIL COMPANY, SOUTH TEXAS NATURAL GAS GATHERING COMPANY,
Intervenors.

No. 15854
and
No. 15910

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITIONS FOR REHEARING.

Filed August 3, 1961

FAHY, Circuit Judge: The Power Commission and the intervenor Shell Oil Company raise in petitions for rehearing several matters which call for discussion.

The Commission points out that the Memphis Light, Gas and Water Division, the party denied intervention in *Memphis Light, Gas & Water Div.* v. *Federal Power Comm'n*, 100 U. S. App. D. C. 205, 243 F. 2d 628, was not a private company whose intervention rights were considered only under the Act and rules governing intervention by private interests. We accept this correction. The Division was established under Chapter 381 of the Private Acts of the General Assembly of the State of Tennessee for the year 1939, authorizing the construction and operation of municipally owned utilities by the City of Memphis, and for related municipal purposes. The Division in that manner became a city agency for a city system, with authority in a Board of Light, Gas and Water Commissioners to make a schedule of rates for the water, gas and power services to the customers of the Division. The Division had a proprietary function, and though in this manner its own rates were made, it was not, even in a limited local sense, a public utility commission with authority as such to regulate rates. There is accordingly some question whether the Division should be considered a "regulatory body" within the meaning of Rule 1.8(a)(1). The difference between the Division and such a regulatory body as PSC no doubt accounts for the opinion in *Memphis* treating the Division principally as though it were a private party. The opinion does contain, however, the paragraph we now set forth in the margin.[1] We do not

[1] This paragraph of the *Memphis* opinion reads:

> As new matter in the petition for rehearing [before the Commission], it was argued for the first time, that Memphis Division, a city department for the sale and distribution of gas, is a "regulatory" body, within the meaning of the Commission's Rule. Aside from the fact that Memphis had previously alleged and argued its position as a city gate cus-

apply this portion of the *Memphis* opinion in a manner to take PSC out of the coverage of section 1.8(a)(1). In so holding we recognize that when the Commission was considering the present case it could with reason consider that *Memphis* supported denial of intervention to PSC under section 1.8(a)(1). But this does not seem to us to be crucial. The crucial question is, rather, whether PSC was entitled to intervenor status on filing notice of intervention. If PSC gained such status by the notices filed, then PSC should have been recognized as an intervenor.

The Power Commission contends that, assuming arguendo the correctness of our construction of section 1.8(a)(1) in its application to PSC, nevertheless the Commission was not required to comply with this section of its rules, that is, the Commission is not a slave to its own rules. The Commission cites for this proposition the cases we set forth at this point in the margin.[2] Such a general principle does not decide this particular case. Of course a court as well as an administrative agency may waive certain of its procedural rules, and, as the cited cases illustrate, rules of procedure have been held in some circumstances not binding upon the agency. In the case before us, however, the Commission did not decide not to apply a procedural rule. It decided the rule with which PSC complied did not govern its intervention rights, quite a different thing. It decided that under its rules, promulgated under express statutory provision for the governance of procedure, the New York State Commission did not acquire intervenor status by filing notice of interven-

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tomer of Texas Gas, which it seems to be, the Memphis Division was still bound under Section 15(a) of the Natural Gas Act to make a showing that would call for exercise of the Commission's discretion permitting intervention.

100 U. S. App. D. C. at 211-12, 243 F. 2d at 634-35. (Footnotes omitted.)

[2] *Sun Oil Co.* v. *Federal Power Comm'n*, 256 F. 2d 233, 239 (5th Cir. 1958), cert. denied, 258 U. S. 872; *National Labor Relations Bd.* v. *Grace Co.*, 184 F. 2d 126, 129 (8th Cir. 1950).

tion. In this, for the reasons explained in our main decision, we think the Power Commission was mistaken.

The Commission's rules governing intervention were adopted, in 1947, apparently in deference to the position of public regulatory bodies in the total congressional plan envisaged by the statute. Of course these rules of procedure may be changed; but we think the Commission may not leave in effect section 1.8(a)(1) and at the same time deny PSC the status the rule gives a State Commission which complies with it. Certainly no bad faith is suggested as attributable to PSC in intervening in these proceedings in the fulfillment of its own responsibilities to consumers in New York State, nor is there any suggestion of abuse.

The petitions for rehearing are denied.

Circuit Judge Danaher adheres to the position stated in his concurring opinion.

Appendix C.

Order Denying Petitions for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15,366 September Term, 1960
Filed Aug. 3, 1961

JOSEPH W. STEWART,
Clerk.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

SHELL OIL COMPANY and SOUTH TEXAS NATURAL GAS GATHERING COMPANY,
Intervenors.

No. 15,854 September Term, 1960

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 15,910 September Term, 1960

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

Before: EDGERTON, FAHY and DANAHER, Circuit Judges.

Appendix C.

Order.

On consideration of the petitions for rehearing filed by the respondent Federal Power Commission and the intervenor Shell Oil Company,

It is ORDERED by the court that the petitions for rehearing are hereby denied for the reasons set forth in the opinion this day filed herein.

Per Circuit Judge Fahy

Dated: August 3, 1961

Circuit Judge Danaher adheres to the position stated in his concurring opinion filed June 15, 1961.

Office-Supreme Court, U.S.
FILED
NOV 24 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 526.

SHELL OIL COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

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TABLE OF CONTENTS.

	PAGE
Question Presented	1
Statement of the Case	2
1. The Issue	2
2. PSC's Attempts to Intervene in the FPC Proceeding	4
3. The Proceeding Below	9
Reasons for Denying the Writ	15
A. The Limited Scope of the Decision Below	15
B. The Limited Effect of the Decision Below in the FPC Proceeding	18
C. The Limited Precedential Significance of the Decision Below	19
D. Affirmative Reason for Denying the Writ	20

Table of Cases.

	PAGE
Atlantic R'fg Co. v. *PSC (Cateo)*, 360 U. S. 378 (1959)	2
Coastal Transmission Corp. et al., Doc. Nos. G-18338, *et al.*, Order on Rehearing Modifying Order Issuing Certificates, issued Nov. 2, 1961	19
PSC v. *FPC*, 361 U. S. 195 (1959)	2
PSC v. *FPC*, 287 F. 2d 143 (DC Cir. 1960)	2
PSC v. *FPC*, 284 F. 2d 200 (1960)	6, 14
PSC v. *FPC*, 287 F. 2d 146 (DC Cir., 1960), *cert. den.* 365 U. S. 880, 882 (1961)	2
Service v. *Dulles*, 354 U. S. 363 (1957)	11
Statement of General Policy No. 61-1, 24 F. P. C. 818 (September 28, 1960)	4
Texaco, Inc., 24 F. P. C. 979 (November 22, 1960)	4
Trunkline Gas Company, et al., 20 F. P. C. 720, 21 F. P. C. 133 and 394 F. P. C. Docket Nos. G-15394, *et al.*	5, 6, 7, 8
UGI and PSC v. *FPC*, 283 F. 2d 817 (9th Cir., 1960), *cert. den.* 365 U. S. 879, 881 (1961)	2
UGI and PSC v. *FPC*, 290 F. 2d 147 (5th Cir., 1961) *cert. den.* 366 U. S. 965 (1961)	2
UGI and PSC v. *FPC*, 290 F. 2d 133 (5th Cir., 1961), *cert. den.* U. S. (October 9, 1961)	2
UGI and PSC v. *FPC*, 287 F. 2d 159 (10th Cir., 1961)	2

Rules.

Rule 1.8(a)(1)	4, 8, 9, 10, 11, 13, 16
Rule 1.8(a), (2) and (b)	8, 9, 10

Statutes.

Natural Gas Act.

Section 15	16
Section 15(a)	16
Section 19(a)	14, 16, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 526.

SHELL OIL COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

Question Presented.

Should this Court (at the request of a natural gas producer) issue a writ of *certiorari* to review a decision (uncontested by the Federal Power Commission) of the Court of Appeals for the District of Columbia Circuit, which holds that one of the subdivisions of one of the Federal agency's administrative rules of practice and procedure, in its present form, authorizes the intervention of a State regulatory commission in the Federal agency's proceedings by the filing by such an intervenor of a notice of intervention?

Statement of the Case.

1. The Issue.

The issue upon which petitioner seeks to engage the attention of this Court—one which it characterizes as having "general importance in the interpretation . . . of the Natural Gas Act" (Pet., p. 8)—concerns the propriety of a Court of Appeals construction of a subdivision of an administrative rule of the Federal Power Commission (FPC), governing the method of intervention in that agency's proceedings by a State regulatory commission. This issue—one that obviously has nothing whatever to do with the "interpretation of the Natural Gas Act" and is concerned only with the meaning of a portion of an administrative agency rule—in this case is ancillary to another issue—one that is truly of "general [and great] importance" in the interpretation of the Act—which has been before the Court on several occasions within the last 2½ years. The latter involves the totally unjustified and unrestrained, drastic upsurgence in producer initial natural gas prices in the principal gas producing areas of the nation. *Atlantic R'f'g Co.* v. *PSC (Catco)*, 360 U. S. 378 (1959); *PSC* v. *FPC*, 361 U. S. 195 (1959); *UGI and PSC* v. *FPC*, 283 F. 2d 817 (9th Cir., 1960), *cert. den.* 365 U. S. 879, 881 (1961); *PSC* v. *FPC*, 287 F. 2d 146 (DC Cir., 1960), *cert. den.* 365 U. S. 880, 882 (1961); *UGI and PSC* v. *FPC*, 290 F. 2d 147 (5th Cir., 1961) *cert. den.* 366 U. S. 965 (1961); *Ibid.*, 290 F. 2d 133 (5th Cir., 1961) *cert. den.* U. S. (Oct. 9, 1961). See also *Ibid.*, 287 F. 2d 159 (10th Cir., 1961); *PSC* v. *FPC*, 287 F. 2d 143 (DC Cir. 1960).

The instant proceeding before the Commission, from which respondent's participation was barred, involved the same major issue. Petitioner there sought and, thanks to

the exclusion of the sole would-be protestant, obtained certificate authority from the FPC for a sale in Texas Railroad District 4, a vital source of supply area for New York-serving pipelines and New York gas consumers, at an initial price in excess of any previously authorized or paid in that district.[1] The sole substantive distinction between this proceeding and those heretofore before the Court—the crucial point upon which this case turned—lay in the fact that the gas purchaser in this proceeding was *not* a New York-serving pipeline.

However, as this Court itself immediately grasped in *Catco*, the first and leading high initial price case to come before it: "The price certificated [by FPC in its Catco certificate order] will in effect become the floor for future contracts in the area [*of gas origin*]." 360 U. S. at p. 390. And, as it had abundant occasion to observe in each subsequent case, that was precisely what occurred in the southern Louisiana area of the Catco production, notwithstanding the fact that entirely different purchasing pipelines were involved in each succeeding sale. The heart of the initial price problem, as this Court and everyone else familiar with the events of recent years is well aware, lies in the *source of supply area* in which an unprecedented initial price is first authorized; the *consuming area* which incidentally happens to be served by the particular purchaser involved in that acquisition, on the other hand, is

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[1] It is respondent's position that the record in the proceeding was totally inadequate to justify the Commission's decision that the sale was required by the public convenience and necessity at petitioner's price. However, the issue of the adequacy or inadequacy of the record to support the Commission's decision on the merits was not, of course, before the Court below nor is it before this Court on the present petition. In its present posture, this case raises only the issue of the propriety of the denial of respondent's intervention and participation in the proceeding and record on which the Commission's decision on the merits was entered.

entirely irrelevant to the central problem. For this reason it was apparent to us that the New York Public Service Commission (PSC) was compelled to intervene in *any* FPC proceeding in which it was proposed to elevate the existing initial price plateau in a vital source of supply area for New York gas consumers. The intensity of that compulsion may be gauged in retrospect by the fact that the price permanently certificated by the Commission for the first time in Texas Railroad District 4 in its instant authorization of petitioner's sale, did in fact become, and even now represents the Commission-condoned floor for subsequent contracts in that source of supply area, including contracts negotiated by New York-serving pipelines. *Statement of General Policy No. 61-1*, 24 F. P. C. 818 (September 28, 1960) and *Texaco, Inc.*, 24 F. P. C. 979 (November 22, 1960) (proceeding reopened by subsequent order).

2. PSC's Attempts to Intervene in the FPC Proceeding.

PSC filed a timely Notice of Intervention in the Commission's proceeding, the full text of which is quoted in the opinion of the Court below and in the instant petition for *certiorari* (Pet. App. C-3 and pp. 4-5. See also R. 38). The Court will note that respondent's Notice was in conformity, *verbatim*, with the provisions of the Commission's rule governing intervention by a State regulatory commission. Sec. 1.8(a)(1) of the Rules of Practice and Procedure, 18 C. F. R. 1.8(a)(1); (Pet. App. B-1). It was also an exact replica of literally scores of other Notices of Intervention which had been filed by respondent, without objection or opposition by anyone, in other FPC proceedings.

In order to explain clearly the ensuing sequence of events, it is necessary to interpose, at this point, a brief

description of the framework in which this proceeding was set. This case marked the second (and the cases with which it was consolidated below, the third and fourth) in a consecutive, systematic, 1959-60 series of endeavors by FPC to block PSC's participation *and, therefore, PSC's right to appeal from the decision on the merits*, in several high initial price proceedings which were, in all material respects, identical with the proceedings in which PSC's appeals were then pending before this and other reviewing courts (see cases cited on p. 2, *supra*). Had those endeavors been successful, of course, the appellate decisions in the then pending cases would have been substantially vitiated, as a practical matter, because many initial prices equal to or exceeding those in litigation would have been embedded, irretrievably, in the price structure of the affected producing areas by Commission decisions which had been rendered appeal-proof by the exclusion of the sole potential appellant.

The first proceeding in this consecutive series of PSC-exclusion endeavors was the *Trunkline* case. *Trunkline Gas Company, et al.*, FPC Docket Nos. G-15394, *et al.* There, as here and as in every other FPC proceeding in which respondent has intervened, PSC filed its standard Notice of Intervention. First, PSC's Notice was "denied" by the Commission (20 F. P. C. 720). Next, PSC applied for reconsideration. A month later, the Commission agreed to reconsider the matter without, however, otherwise altering its exclusion determination (unreported order issued January 5, 1959). Three weeks after that, on January 30, 1959, when the hearing (which had been in progress during all of this time) was on the verge of conclusion, the Commission issued another order granting respondent "limited participation", but again denying intervention

pending still further order (21 F. P. C. 133). The "limited participation" purportedly was offered for the purpose of according PSC an opportunity to present an evidentiary "showing" which would establish an interest sufficient to warrant its intervention in the proceeding, which was then almost completed. This order marked the first occasion on which the Commission attempted, *ex post facto*, to append a "showing of interest" requirement to the published version of its State regulatory commission intervention rule.

Notwithstanding the fact that the nature and basis of PSC's "interest" in *Trunkline* was self-evident to begin with and had been explained in detail in our earlier pleadings in the case in addition, we diligently, promptly and in good faith attempted to comply with the new requirement by tendering the demanded "showing" in the form of documentary evidence. On March 26, 1959, a month after this submission, the Commission issued still another order in *Trunkline*, announcing, for the first time, that its January 30 order had envisioned a *testimonial* rather than a *documentary* "showing" and that the former should have been presented at the hearing session which had convened in Washington one day after its January 30 order had been received at respondent's offices in New York (21 F. P. C. 394).[2]

Meanwhile, as indicated above, on March 13, 1959, PSC attempted to intervene by the usual Notice procedure in

[2] Although this completes the *Trunkline* background of the instant case, it by no means completes the *Trunkline* case itself *or* the story of PSC's four unsuccessful attempts to intervene in that proceeding. PSC subsequently instituted an appeal in *Trunkline*. However, on consolidated motions to dismiss PSC's *Trunkline* appeal and its appeal in this case, the Court below granted the motion in the former, on the ground that our petition for review was untimely, and denied the motion in the latter. *PSC* v. *FPC*, 284 F. 2d 200 (1960).

the instant FPC proceeding. We were (1) still firmly convinced of our right to intervene by the filing of Notice, according to the explicit provisions of the Commission's Rule 1.8(a)(1) and (2) quite unclear as to precisely what was required of us under the Commission's novel, recently announced and, in our view, entirely superfluous "showing of interest" procedure.

On March 26, the same day on which it rejected PSC's documentary "showing of interest" in *Trunkline* and disclosed for the first time that a testimonial showing had been contemplated, the Commission issued its "Order Permitting Limited Participation and Denying Intervention Pending Further Order" in this proceeding, again temporarily denying intervention and simultaneously purporting to accord respondent an opportunity to present a "showing" of our interest (R. 39-40). Both orders were received by respondent in the same mail delivery on March 30, 1959, one day preceding the scheduled commencement of hearings in the instant proceeding.

We wish to emphasize to the Court that, at this juncture, although considerably disillusioned by our repeated though apparently fruitless efforts to satisfy the Commission's intervention requirements in *Trunkline*, PSC was by no means willing to believe that it was *the fact of our participation* which was completely and unalterably repugnant to the Commission. We still accepted, at face value, its ostensible complaint that it was our *method of pursuing intervenor status* that somehow, mysteriously, constantly fell short of satisfying its newly revealed, endlessly proliferated, ever changing intervention requirements. And respondent's primary concern was to win recognition of its intervenor status. We did not consider it of crucial importance whether our intervention was accomplished

pursuant to FPC Rule 1.8(a)(1), specifically applicable to State regulatory commissions or pursuant to Rule 1.8(a)(2) and (b), applicable to other persons (as petitioners for intervention) or pursuant to the new "showing of interest" procedure, visible in no section of the Commission's published intervention rules.

Therefore, although convinced of our right to intervene by Notice, we were perfectly willing to comply with the "showing of interest" procedure, if that was what the Commission required. Therefore, although unable to detect the unique difference between a documentary and a testimonial "showing", we were perfectly willing to proceed with the latter, if that was what the Commission required. And so, on the day following receipt of the Commission's March 26 orders in *Trunkline* and in the instant proceeding, PSC appeared at the hearing in this proceeding and orally requested the issuance of subpoenas to compel the attendance of witnesses and the production of documents, not in our control, which were essential to permit us to make the testimonial "showing" apparently called for (R. 4, 6-8, 11, 13). The presiding examiner directed that respondent's requests be reduced to writing (R. 9). Within two days respondent had complied with this demand as well (R. 42-49). More than three weeks later, long after the hearing had closed, the Commission issued an order denying the request for subpoenas *on the ground that PSC's "allegations" of interest, which the Commission for months in this proceeding and in Trunkline, had been inviting us to prove up by means of a "showing", did not demonstrate that the evidence we sought to obtain through the subpoenas was "relevant and material" to the inquiry* (R. 69, 72)!

With this, our remaining sanguine illusions were completely shattered. Although, in our application for recon-

sideration of the Commission's orders denying our intervention and denying subpoenas, we earnestly requested to be disabused of the now inescapable conclusion that we had been launched on a wild goose chase in a vain and predoomed effort to furnish a "showing" in support of "allegations of interest" which the Commission deemed irrelevant and immaterial to begin with, no reassurance on the point was forthcoming (R. 74-83, 84-87).

At this point, it was clear *for the first time* that every administrative avenue for achieving intervenor status had been exhausted. By the same taken, it was also clear for the first time that the opportunity to seek judicial review was available.

3. The Proceeding Below.

In presenting its case to the Court below, respondent argued that its right to intervene in the Commission's proceeding was based on two sources. Once source was Section (a)(1) of Rule 1.8 of the Commission's Rules of Practice and Procedure, specifically applicable to intervention of State regulatory commissions and other public agencies having rate regulatory jurisdiction. The other was Sections (a)(2) and (b) of the same Rule, applicable to intervention by "any (other) person."

In support of its right to intervene by the filing of Notice, respondent relied on the brief, simple and unambiguous language of Section (a)(1) itself. Similarly, the majority of the Court below, after setting forth the text of that section in its opinion, held: "We read this language as meaning what it says; it grants permission to a State Commission to participate as intervenor by filing a notice of intervention" (Pet. App. C-5). The Court then proceeded to compare the simple Notice procedure provided

by this section for intervention by a State commission with the more elaborate procedures contemplated by Sections (a)(2), (b)-(f) of the same Rule, applicable to intervention by others. At the conclusion of its opinion and again in its opinion on rehearing, the Court below adverted to the fact that if the Commission wished to make more stringent its rule governing State regulatory commission intervention, it was at perfect liberty, *sua sponte*, to do so at any time, but concluded again that ". . . under the present rules the interest of a State Commission in intervening is shown when it files a notice of intervention, . . ." (Pet. App. C-7 and C-16).

The Court's last quoted statement, we respectfully submit, provides the short but complete answer to the second point argued by petitioner in its "Reasons for Granting the Writ" (Pet., pp. 14-17) and argued previously by both petitioner and the FPC in the proceeding below. PSC agrees, always has agreed and could not possibly disagree with petitioner's repeated insistence that Section 15(a) of the Act is addressed to intervention by "*interested*" State commissions. PSC and the Court below differ with petitioner only as to the method by which that "*interest*" is required to be established under the rules adopted by the Commission pursuant to the statutory authority conferred in that section. In our view and the view of the Court of Appeals, the eight lines comprising Section (a)(1) of Rule 1.8 admit of one answer only: the "*interest*" of a State regulatory commission is established by its filing of a Notice of Intervention.

In the proceeding below, the FPC itself conceded that the PSC-Court of Appeals view was correct in any proceeding involving a sale to a New York-serving pipeline. It insisted, however, that some other method was required

to establish PSC's "interest" in a proceeding involving a sale to a non-New York-serving pipeline. PSC did not, and does not now deny that the Commission could adopt and publish rules embodying that distinction if it chose to do so. We simply assert that it never has done so, either before or since the decision here sought to be reviewed. Neither we nor the Court below were able to detect anything in Section (a)(1) of Rule 1.8 as it was and is presently constituted, to lend the slightest support to the theory that the availability of the Notice procedure to a State Commission was dependent upon the specific nature of the proceeding involved. On the contrary, the rule itself expressly provides that that procedure is available to effect intervention by a State commission in "*a* [i.e., *any* FPC] proceeding." Administrative agency action that violates the agency's own rules may not stand. *Service* v. *Dulles*, 354 U. S. 363 (1957). No court has ever been reversed, as "transcend[ing] the appropriate scope of judicial review", for so holding (See Pet., p. 14).

Petitioner's *first* argument in support of its present request for *certiorari* (Pet., pp. 8-14) was also urged in its defense below of the Commission's exclusion order. In this argument, however, petitioner not only lacked the support of its co-respondent below but indeed took a position diametrically opposed to that asserted by the FPC.

Petitioner's thesis that respondent's appeal below was partially barred by PSC's omission to file an application for rehearing within thirty days of the Commission's order of March 26, 1959 (R. 39-41), necessarily depends on the underlying premise that the March 26 order was a "final" decision, immediately appealable after denial of its rehearing. FPC, on the other hand, the issuer of that order, contended vehemently to the Court below that its March 26

order did not constitute a "final", immediately appealable decision. In this controversy, respondent thinks it impossible not to agree with FPC.

Although we believe that both the title and the practical effect of the Commission's March 26 order, denying PSC's intervention *pending further order*, are sufficient to negate conclusively any suggestion of "finality", we find it unnecessary to rely on the language of the order alone. We believe the inherent fallacy of petitioner's thesis would be equally apparent even if the March 26 order contained no such specific finality-contradicting language at all. That fallacy lies in petitioner's apparent conception that PSC was attempting to enforce *two* separate, totally unrelated and individually appealable intervention rights in the Commission's proceeding; one, an "of right" or absolute right to intervene, and the other, a right to a Commission order permitting intervention. In its view, the Commission's order of March 26 constituted a final denial of respondent's first, or "absolute" right of intervention, requiring respondent (1) to seek rehearing within thirty days and to file a petition for review within sixty days while (2) simultaneously attempting to satisfy the requirement, embodied in the same March 26 order, that it establish "an interest which would serve as a basis for permissive intervention" (Pet., p. 9). In other words, according to petitioner, respondent was required to pursue its appeal from that part of the March 26 order which denied its intervention "of right" and, at the same time, to undertake compliance with that part of the same order which offered the prospect of permissive intervention.

We believe this thesis to be invalid on its face and, if pursued to its logical (or more accurately, its illogical) conclusion, to be utterly fantastic. We are at a loss to under-

stand how respondent conscientiously could have adopted petitioner's notion that we were legally "aggrieved" by denial of the right to intervene by *Notice* while the *right to intervene, per se*, was still ostensibly open (Pet., p. 11). We were, after all, concerned with the *substance* of the intervention right, not with its *form*.

Had respondent's pursuit of "permissive" intervention been successful before the Commission, we think that any pending appeal on the denial of its intervention "of right" would have become absolutely moot. On the other hand, had respondent's pursuit of "permissive" intervention been unsuccessful in the Commission, PSC would have found itself before the Court below, with *two* appeals seeking the same relief—*i.e.*, adjudication of its *single* right to intervene in the Commission's proceeding. We can conceive of no procedure which would have involved a greater or more unjustified imposition on the time and patience of the Court of Appeals than that apparently suggested by petitioner. Indeed, we think it must be unique in the annals of legal history for an appellant to seek review, particularly in this Court, because the respondent did *not* endeavor to split its cause of action below.

We believe the essential misconception on which petitioner's thesis is founded lies in its confusion between the *number of intervention rights* claimed by respondent and the *number of bases* upon which that right rested. We claimed, of course, only *one* right to intervene. We asserted, however, that there were *two* bases for that right within the Commission's Rule 1.8. Our attempts to enforce our *single* right of intervention comprised a *single*, continuing course of endeavor and the Commission's denials of that *single* right of intervention, which continued long after March 26, could give rise to only *one* cause of action on

appeal—a cause of action which could not arise until *all* administrative remedies had been exhausted.

However, as we argued below, even if the Court of Appeals, PSC and FPC were all incorrect in regarding the latter's March 26 order, de ying intervention pending further order, as a non-final decision and in regarding PSC's intervention right in the FPC proceeding as singular rather than plural, the Court still did not exceed its jurisdiction in deciding the case as it did. Petitioner's sole cited authority for its proposition that the thirty-day rehearing provision of Section 19(a) of the Natural Gas Act is a "jurisdictional" requirement, is a decision rendered in a related case (*Trunkline*) by the very Court that decided the present case—a decision the Court itself cited in the opinion here sought to be reviewed.[3] That case was concerned with the question of whether an appeal by an excluded would-be intervenor would lie from the Commission's decision on the merits in the proceeding from which the petitioner had been barred, or only from the Commission's final order denying the petitioner's intervention. To the extent that the DC Circuit's decision in that case has bearing on any issue raised by petitioner here, it simply corroborates the DC Circuit's decision in this case, for it holds that the properly appealable order in *Trunkline* was the last FPC order denying intervention, *not* the ultimate Commission determination on the merits *nor* the earlier Commission orders denying PSC's right to intervene by the filing of notice. However, the *Trunkline* decision offers no support whatever for petitioner's asserted "jurisdictional" character of the thirty-day rehearing provision, for the very simple reason that that issue was neither raised nor involved nor decided in that case.

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[3] *PSC* v. *FPC*, *supra*, ftn. 2. The decision is cited at ftn. 10 of the majority opinion below. Pet. App. C-8.

On the other hand, FPC's Rules (Section 1.13(d)) specifically authorize the Commission to extend the specified time for the filing of various documents and the Commission has, in fact, accepted late filed documents on numerous occasions. By *accepting* PSC's May 26 application for rehearing of its March 26 order (the application was *denied* on its merits by the Commission's order of July 16 rather than *rejected* as untimely—R. 84-87), the Commission must be deemed to have extended *pro tanto* any thirty-day or other time limitation.

Reasons for Denying the Writ.

We believe the Court will have perceived, long before this point, that the Court of Appeals decision here sought to be reviewed is much more limited in scope and far less complex than either the extraordinarily involved FPC background from which the case emanated or the "questions" that petitioner has attempted to read into it. Essentially, the Court below undertook simply to interpret an eight-line subdivision of one of the FPC's administrative rules of practice and procedure. It concluded that the language of that subdivision means what it says.

Respondent believes the Court of Appeals decision is eminently and manifestly correct. But we respectfully submit that even if some doubt on that score existed, this case presents no issue of any pertinence to the body of federal law or of sufficient importance, in this or any other respect, to justify petitioner's attempt to invoke review by this Court.

A. The Limited Scope of the Decision Below.

Although petitioner has asserted that the case presents "questions . . . of general importance in the interpreta-

tion . . . of the Natural Gas Act" and, in an attempt to substantiate the assertion, has endeavored to conjure up questions relating to the interpretation of Sections 15(a) and 19(a) (Pet., pp. 8-16), we think it obvious that the decision below does not purport to interpret these or any other provisions of the Act and does not raise any questions concerning their interpretation.

The complete text of Section 15 of the Act is set forth in the Court's majority opinion following its statement of the three consolidated cases below. Immediately following its quotation of the statute, the Court observes: "The Act (Sec. 15) is thus phrased in permissive terms. The permission, however, is to be controlled by such 'rules and regulations as it [the Commission] may prescribe.'" (Pet. App. C-4.) These two sentences comprise the totality of the Court's "interpretation" of Section 15. The majority opinion then proceeds: "The cases before us naturally are governed by the Commission's rules" (Pet. App. C-4-5). The entire remainder of the discussion and the decision is devoted to the Court's analysis of the aforementioned "Commission's rules", particularly Rule 1.8(a)(1).

But if the Court of Appeals "interpretation" of Section 15 of the Natural Gas Act is next to non-existent, its alleged interpretation of Section 19(a) is a figment of petitioner's imagination entirely. In fact, none of the three opinions below even cites or refers to that section of the Act, although, as petitioner points out, the Court of Appeals was accorded the full benefit of its theory as to the "jurisdictional" character of the thirty-day rehearing provision thereof. In our view, the simple and obvious reason why "the Court of Appeals did not come to grips" (Pet., p. 8) with petitioner's "jurisdictional thirty-day" theory is that it correctly regarded the entire issue as palpably spurious and patently irrelevant to the case.

As the tenor of the two majority opinions makes abundantly clear, the Court of Appeals simply rejected, out of hand and without comment, petitioner's essential underlying premise that PSC's single cause of action for review of the denial of its intervention should have been pursued as two separate causes of action; one for denial of its intervention "of right" and the other for denial of an order permitting its intervention. Accordingly, the Court also rejected petitioner's related premise that the Commission's March 26 order, denying intervention pending further order, was a "final" decision, ripe for appeal, on the "of right" issue only, after denial of rehearing. Therefore, the Court simply had no occasion to consider, and was not called upon to decide, whether the thirty-day rehearing provision of Section 19(a) was "jurisdictional" or not.

We respectfully venture to suggest that petitioner's gratuitous attempt to convert the Court's obvious rejection of its entire two-causes-of-action theory into a "*sub silentio* [holding] that respondent was not required to comply with Section 19(a)'s thirty-day jurisdictional limitation" (Pet., p. 13), is not as ingenuous as petitioner apparently would like it to seem. The real question petitioner wishes to pose to this Court, despite the emphatic, if implicit, negative answer given by the Court below, is whether an excluded State regulatory commission is required to pursue two separate appeals from the FPC's denial of its intervention in order to obtain complete judicial relief. Section 19(a) of the Natural Gas Act, and its thirty-day rehearing provision, simply happens to be the convenient statutory peg upon which petitioner has chosen to append this question.

B. The Limited Effect of the Decision Below in the FPC Proceeding.

Although not completely in accord with petitioner's depiction of the course of possible future FPC proceedings in this case (see Pet., p. 7), we agree with petitioner generally, that the most drastic and far reaching effect of the decision below will be to permit reopening of the proceeding in which, after excluding PSC, the Commission, on December 1, 1959, before it had the benefit of this Court's and other appellate court guidance on the proper interpretation to be accorded the *Catco* decision, authorized an unprecedented initial price for petitioner's sale in a gas producing area which is of vital importance to New York gas consumers. We note that this is precisely the course that already has been pursued by the Commission, with commendable promptness, in the two analogous proceedings which were consolidated with the instant case below.[4] We

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[4] We also think that the Commission's latest views on the intervention and initial gas price issues raised by these cases will be of interest to the Court in weighing petitioner's request for *certiorari*. In a recent order in the proceeding which was consolidated below as No. 15910, the Commission stated:

> "... A recent judicial decision holds that the Public Service Commission of the State of New York (PSC) was entitled to intervene in this case, and we intend to permit this party to exercise its right to participate in the development of evidence directed to determining what are the proper initial prices for the producers' sales.
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> "... After the court laid bare our error, all matters of administrative discretion were again opened for determination on remand and we were charged with the duty of exercising our discretion anew, of again judging the applications in the light of public convenience and necessity. Clearly, these facts justified our rescinding the September 19, 1960 producer certificates.
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> "In addition, many events have taken place since September 19, 1960, which have a profound bearing on the producer price problem, and the public interest demands that we consider those matters too in determining the proper prices for the producers' sales. Following the decision of the Supreme

also agree that any future FPC decisions in this proceeding will have to be made on a record which includes the participation of PSC as a proper party. Meanwhile, however, petitioner's underlying sale may continue in effect uninterruptedly.

We wish to make it clear that respondent is no less irked than petitioner by the necessity for repetitious FPC proceedings. However, if the responsibility for that unfortunate necessity may be laid at any door, we submit the appropriate door is petitioner's rather than respondent's; for it was petitioner which vehemently opposed all of respondent's efforts to intervene in the FPC proceeding in the first place (R. 50-58) and petitioner which accepted the certificates issued by the Commission on December 1, 1959 with full knowledge that respondent's appeal from the denial of its intervention was pending in the Court below.

C. The Limited Precedential Significance of the Decision Below.

Although petitioner (Pet. p. 17) has raised the unwelcome (to it) specter of intervention by Notice in FPC proceedings by "*any* State commission . . . (and . . . the untold

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Court in the *CATCO* case reversing our issuance of unconditioned producer certificates, we have, with the issuance of our Statement of General Policy 61-1 on September 28, 1960, undertaken new methods of holding the line on initial producer prices. Also, several cases interpreting *CATCO* have been remanded to us by the courts basically on the grounds that our orders did not conform to the requirements of *CATCO*. We believe that in the light of these developments, the September 19, 1960 certificates must be set aside and the price issue considered anew in order to determine whether we would proceed the same way and reach the same result, had we the benefit of our Policy Statement and these court teachings."

Coastal Transmission Corp. et al., Doc. Nos. G-18338, *et al.*, Order on Rehearing Modifying Order Issuing Certificates, issued Nov. 2, 1961, Mimeo. pp. 5-6 (footnotes omitted).

number of regulatory bodies of *municipalities*)", we believe that the Court, in considering petitioner's appeal to its discretion, would be interested in a realistic appraisal of the widest conceivable general applicability, precedential significance and impact on the administrative process of a Court of Appeals' holding that PSC may intervene in FPC proceedings by the filing of Notice.

The opinion on rehearing of the Court below specifically negates any thought that its decision is necessarily to be deemed applicable to municipal bodies which exercise, among other powers, proprietary or quasi-private gas distribution functions (Pet. App. C-14-15). Accordingly, the maximum number potentially affected by the decision sought to be reviewed are the regulatory commissions of the 46 states which have natural gas consumption and the municipalities, if any, which exercise analogous, rate-regulatory, non-proprietary functions. Of these, over the last decade, only a handful have exhibited any concern whatever with FPC proceedings. Of the handful, only three (respondent, the California and Wisconsin Public Service Commissions) have participated actively in some proceedings. And, as the Court below observed twice: "We are cited to no instance of abuse of the right [to intervene by Notice, on the part of PSC or anyone else]" (Pet. App. C-7 and C-16).

D. Affirmative Reason for Denying the Writ.

Up to this point we have dealt with the *absence* of any issue in this case of sufficient importance to *impel* the discretionary granting of petitioner's request for a writ of *certiorari*. In our view, however, there is also one *affirmative* factor, of compelling and overwhelming importance, militating *against* the granting of the writ. It is the simple and acknowledged fact that the decision below and, perforce, any decision which might be issued by this Court,

may be rendered completely academic, at any time, by an FPC amendment of its administrative rule of intervention.

Throughout the proceeding below PSC conceded, in fact, urged, that FPC was perfectly free to eliminate the Notice of Intervention procedure for State regulatory commissions whenever it chose to do so, by a *sua sponte* amendment to its current, published intervention rule. The Court below emphasized the same point, not once but twice, in its majority opinion and its opinion on rehearing (Pet. App. C-7 and C-16). The Commission, however, whose administrative rule is the sole real subject of this controversy, has thus far evinced no disposition whatever to quarrel with the Courts of Appeals' interpretation of that rule, either by petitioning this Court for a writ of *certiorari* or by undertaking to amend the rule itself.

To recapitulate:

(1) This case concerns an interpretation, not of the Natural Gas Act, but of an eight-line subdivision of one of the FPC's administrative rules of practice and procedure.

(2) The issue upon which petitioner seeks review in this Court concerns, not the propriety of PSC's intervention *per se* in the instant or any other FPC proceeding, but the propriety of its intervention by the filing of Notice.

(3) Even if that issue were decided favorably to petitioner by this Court, the case would have to be remanded to permit the Court of Appeals to consider the other asserted ground for PSC's right to intervene in the FPC proceeding—a ground which already has been passed upon, favorably to respondent, by the concurring Judge below.

(4) The general legal significance of the intervention by Notice issue, absent any change in the language of the aforementioned disputed subdivision, is limited to the

method of acquiring intervenor status, available to a *handful* of *public* agencies, to whom *no abuse* of their rights under the subdivision has ever been charged; and

(5) Even that narrow significance may be eliminated completely, at any time, by the simple device of an FPC amendment of its rule.

Under the circumstances, we respectfully submit that petitioner's desire to engage the attention of this Court upon review of the decision below, for the sole sake of possibly sparing it the inconvenience of being required to justify its initial gas price in the presence of respondent and in the light of relevant initial price principles enunciated by this and other courts since the issuance of the original, 1959, FPC decision on the merits in the proceeding, is totally unjustified.

Respectfully submitted,

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Dated: November 22, 1961.

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